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No. 98-60

In The

Supreme Court of the United States

October Term, 1997

KEITH BUCK,

Petitioner,

vs.

FRIES & FRIES, INC. and HERCULES FLAVOR, INC. d/b/a TASTEMAKER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBIN E. HARVEY
Counsel of Record
AMY L. GARRARD
BAKER & HOSTETLER LLP
Attorneys for Respondents
312 Walnut Street
Suite 2650
Cincinnati, Ohio 45202-4038
(513) 929-3400

148295

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Should the duty to accommodate a "regarded as" disabled employee within the meaning of the americans with disabilities act encompass a duty to afford him an opportunity to undergo particularized on-site testing at his place of employment in order to demonstrate that he can perform the essential elements of his job?

STATEMENT PURSUANT TO RULE 29.6

Petitioner named multiple entities in his original action. Fries & Fries was Petitioner's original employer. It's business was transferred to a joint venture known as "Tastemaker" that it co-owned with Hercules Flavor. Tastemaker was purchased on March 31, 1997 by an affiliate of Roche Holding, Ltd., a Swiss company, Hoffman LaRoche, USA, and now operates under the name "Givaudan Roure." Respondents have no material interest in any nonwholly owned subsidiaries.

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The Respondents request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered on April 3, 1998. The Sixth Circuit affirmed an earlier judgment entered by the United States District Court for the Southern District of Ohio, Western Division on December 29, 1996, granting summary judgment to Respondents on all of Petitioner's Americans with Disabilities Act ("ADA") claims.

STATEMENT OF JURISDICTION

Jurisdiction to review a judgment entered by a court of appeals is conferred upon this Court by 28 U.S.C. § 1254(1). In order to be considered timely, a Petition for a Writ of Certiorari must be filed within ninety (90) days from the entry of judgment in the court of appeals. 28 U.S.C. § 2101(c). Judgment for Respondents in this case was rendered by the Sixth Circuit on April 3, 1998. Therefore, the July 2, 1998 Petition for Writ of Certiorari was timely filed.

STATEMENT OF THE CASE

On February 26, 1979, Petitioner Dr. Keith Buck ("Petitioner") was hired as a research bench chemist by Respondent Tastemaker ("Tastemaker"). Tastemaker was, at all times relevant to this action, engaged primarily in the research, development and manufacture of flavorings for the food and beverage industry. As a research bench chemist, Petitioner engaged in bench research, developing new organic synthesis pathways for the creation and manufacture of chemical ingredients to be used in food and beverage flavoring.

Once Petitioner developed a new synthesis pathway, he then designed, implemented and supervised laboratory experiments to test the product. Often, these experiments were potentially dangerous, involving the use of volatile materials that could be explosive when mixed with air. The laboratory work also involved the use of energy sources producing extreme heat and cold.

In 1986, Petitioner was promoted to the position of senior bench chemist largely as a result of his ability to develop creative organic synthesis combinations. Petitioner's creative problem solving ability was

valued both by Tastemaker, and by his colleagues. Frequently, other bench chemists would use Petitioner as a sounding board for their ideas and experimental designs, seeking his advice and guidance in matters of organic chemistry. Petitioner also routinely consulted with Mr. Tony Boeing, the Manager of Chemical Manufacturing, to assist in transitioning newly developed materials from the laboratory to mass production.

On September 12, 1991, Petitioner fell, hitting the front of his head on a concrete sidewalk as he exited an automobile in which he had been riding as a passenger. He suffered a skull fracture and a subdural hematoma, which required emergency surgery and left him with significant cognitive impairments. (App. 331). Petitioner was hospitalized for about a month, during which time his condition was evaluated by Dr. Robert Tureen, a neuropsychologist who administered numerous tests to determine the extent of Petitioner's injuries. The results of Dr. Tureen's examination were cited in a report dated October 4, 1991, wherein he concluded that Petitioner had severe cognitive deficits:

> . . . [Petitioner] is an individual who has both severe memory deficits, as well as significantly impaired novel problem solving ability. Characteristic of the memory problems is a high degree of confabulatory activity, with no awareness of the inappropriateness of the material. . . .

(App. 298).[1] "Confabulatory activity," as defined by Dr. Tureen, referred to the act of making up information to compensate for a lack of memory recall. Apparently, Petitioner would resort to inventing information he was unable to remember.[2] Dr. Tureen also evidenced a concern that Petitioner would not be able to function independently as a result of his memory problems, and he suggested that Petitioner consider a transitional living situation upon his release from the hospital. In his deposition, Dr. Tureen testified that, in his opinion, Petitioner was not ready to return to work in October 1991. (App. 1633).

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1. Because the Appendix submitted by Petitioners contains only selected pages of the medical reports and other source documents, citations to "App. __" refer to the joint appendix filed in *Buck v. Fries & Fries, Inc., et al.*, No. 97-3093 (6th Cir. 1998).

2. Also symptomatic of Petitioner's injuries was his inability to recognize, understand and accept his cognitive limitations.

Despite Dr. Tureen's evaluation, Petitioner returned to work at Tastemaker on October 21, 1991.[3] Originally Petitioner returned "without restriction" because his treating neurologist, Dr. James Anthony, supplied him with an unrestricted return to work letter. Although no requests for accommodation were made by Petitioner or any of Petitioner's physicians, it was readily apparent to Petitioner's colleagues that he was not able to resume his former bench chemistry responsibilities.

According to employees who worked with Petitioner prior to his injury, he appeared disoriented, disengaged and disinterested in his job duties after the accident. For example, Mr. Boeing, who had used Petitioner as a resource to help transition flavors from the lab to the manufacturing plant, testified that after Petitioner's accident, he noticed a dramatic difference in his ability to create plausible hypotheses to assist in resolving manufacturing issues. Indeed, Petitioner began exhibiting what Mr. Boeing termed as an "evasive" attitude in response to pointed questions, leading others to believe that he was having trouble understanding the questions themselves. (App. 1302).

In an effort to encourage Petitioner to again engage in chemistry and resume his prior job duties, Respondent assigned Petitioner sets of defined tasks and provided him with direct supervision from several managers of the Research and Development team. Before his accident, Petitioner had often provided critiques and advice to other bench chemists. One of the first activities he was encouraged to resume was discussing projects and evaluating techniques with his former research assistant, Mr. Andy Lam. After a short time it was clear that Petitioner was unable to contribute to Mr. Lam's projects. Instead of assisting in Petitioner's recovery, the discussions simply served to irritate and frustrate Petitioner. Out of this frustration, Petitioner would become enraged at his colleagues and engage in disruptive behavior. (App. 1022).

Dr. Anthony J. Dennis, Respondent's Vice President of Research and Development, likewise noted Petitioner's cognitive deficiencies. Dr. Dennis recounted instances where he had the same conversation with Petitioner "over and over again." Additionally, Dr. Dennis testified that Petitioner's injuries had manifested themselves physically as well as

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3. Respondents were unaware of Dr. Tureen's report at the time Petitioner returned to work, and only discovered its existence during the course of litigation.

cognitively: "[I]t was very obvious that [Petitioner] was extremely unsteady on his feet and was having difficulty just getting around, . . ." (App. 1472). Another colleague, Dr. Robinson, echoed this conclusion by noting that "[Petitioner] would have to support himself on the walls as he was walking, because he couldn't really stand by himself very well for fear of falling." (App. 1573).

In December 1991, Petitioner fell while working in Respondent's laboratory. He did not return to work for two months until February, 1992. Initially, Petitioner was treated in the emergency room of a nearby hospital by Dr. James Lutz. Dr. Lutz continued to treat Petitioner after this initial visit. In January, 1992, Dr. Lutz agreed to sign a return to work letter restricting Petitioner to performing "alternative" duties in a "safe, controlled environment."

However, Petitioner did not immediately return to work. Instead, Petitioner waited an additional month, during which time Dr. Lutz conducted a follow-up evaluation of Petitioner's condition. Dr. Lutz modified Petitioner's work restrictions in February 1992, limiting Petitioner to working in a "supervised setting with non-dangerous chemicals until further evaluation." (App. 303). When Petitioner did return to work from his two-month paid disability leave, Respondent, in compliance with Dr. Lutz's second evaluation, limited Petitioner to performing non-laboratory duties. While Petitioner was still encouraged to perform theoretical chemistry, he was restricted from personally performing any laboratory work.

Upon his return to Tastemaker in February 1992 Petitioner was uncommunicative and distracted. He refused to participate in discussions with colleagues regarding pending experiments, and he even became argumentative on occasion when confronted with questions. (App. 1022). Based on the observations of Petitioner's supervisors and colleagues, Tastemaker became concerned that Petitioner would never be able to perform bench chemistry at his former level. In order to assist in his recovery, Tastemaker provided Petitioner with the time and opportunity to study organic chemistry in the hope that he could recapture the intellectual creativity that had been absent since his accident. He was relocated to an office in the Administrative Building of Tastemaker in close proximity to his friend and fellow chemist, Mr. Kenneth Strassburger. (App. 1610). Tastemaker did not apply any pressure upon

Petitioner to produce results during this period. Instead, Petitioner was provided with the support, time and encouragement of Tastemaker in the hopes that he would regain his pre-injury level of technical competence and creative problem solving ability.

Petitioner was given the opportunity to work for four months reacquainting himself with organic chemistry. Even after this four-month period of review, Petitioner continued to exhibit significant physical and cognitive problems. Despite the continued existence of these problems, Petitioner pleaded to return to the laboratory. In order to balance a desire to encourage Petitioner's recovery and a genuine concern for employee safety, Dr. Dennis issued a memorandum outlining a five-stage plan that had been developed to evaluate Petitioner's ability to resume his former laboratory work. The goal of Dr. Dennis's June 15, 1992 memorandum was to assist Petitioner in designing and safely completing experiments he could perform prior to his accident. (App. 307).

During the summer of 1992, Petitioner focused his efforts on completing the five steps outlined in Dr. Dennis's memorandum, so that he might return to the laboratory. The first four stages of the plan required the design of several organic synthesis pathways. While Petitioner was technically able to design the pathways, it was apparent to colleagues, Drs. Dennis and Robinson, that he was still suffering from residual effects of his brain injury, both mentally and physically. Dr. Robinson testified that Petitioner approached him several times a week to ask what he needed to do to return to the lab. Each time, Dr. Robinson would explain the five-stage plan, and Petitioner would seemingly leave satisfied, only to return the next day and ask again. (App. 1574).

Dr. Dennis testified that, with respect to the completion of the synthesis pathways, Petitioner was given a "passing grade," even though his responses were rote and there was a marked lack of the creativity and innovation that formerly distinguished his work:

> [I]n questioning [Petitioner] about the pathways, . . . we weren't seeing a lot of creativity. [Petitioner] had always been a very creative and innovative scientist. In these pathways, we weren't seeing that innovation. They were the kind of things [Petitioner] would repetitively talk about.

> So, while he had met the letter of what we had said, and laid out some synthesis pathways, they were pretty much by rote. But we wanted to encourage him, I specifically wanted him to keep going. So, we said, yeah, okay, we'll give you a passing grade on that, on having put those together. But, I did have reservations.

(App. 1485).

On August 20, 1992, Dr. Dennis wrote a follow-up memorandum to Petitioner suggesting that, based on his performance on the first four stages of the plan, he might more fully participate in the development of chemical synthesis research programs within Tastemaker. However, the memorandum also documented some of the concerns that Dr. Dennis had with Petitioner's physical ability to return to the laboratory:

> However, I remain seriously concerned about your abilities to physically handle experimentation in the laboratory in a safe fashion. . . . I observed occurrences of physical unsteadiness. My observations have been supported by others within the company. Your safety and the safety of our other employees is our paramount concern. As you know, the hazards in [the Organic Synthesis Lab] are substantial given the handling of toxic and explosive chemicals and potentially dangerous physical processes that require a steady hand and continuous monitoring. Because I believe your physical recovery requires more progress to ensure a safe work environment, ***I am not as yet authorizing you to physically perform your own experimentation*** . . . .

(App. 308) (emphasis added). In addition, the memorandum stated that Petitioner was to "maintain strict abstinence of the handling of chemical materials or experimental apparatus . . . until further notice."

Petitioner acknowledged in writing his receipt and acceptance of the conditions imposed by Dr. Dennis in the memorandum, and he was permitted to return to his office in the laboratory building in late August 1992. Despite repeated requests from Terri Bonar-Stewart, the Vice President of Human Relations, Tastemaker never received an unrestricted return to work letter for Petitioner. (App. 922). As a result of the concerns

of Drs. Dennis and Robinson, and because Petitioner was still subject to the work restrictions imposed by Dr. Lutz following his fall in Tastemaker's laboratory, Petitioner was strictly prohibited from personally performing any experiments.

In order to implement Petitioner's synthesis pathway designs, Tastemaker provided Petitioner with a lab assistant who could perform all of his hands-on laboratory work. (App. 1347). Also, at the request of Petitioner, Tastemaker paid for physical therapy in excess of the limitations imposed by Petitioner's medical insurance. (App. 308).

Although rehabilitative efforts continued, Petitioner had serious functional problems and refused to adhere to the restrictions placed upon his job duties. In May 1993, Petitioner became violent when observed going through the research files of his former lab assistant, Mr. Lam. Following this incident, Petitioner was warned that any further incidents of violent behavior could result in his termination. (App. 311).

At this point, it became clear to Tastemaker that a hazard assessment needed to be done with respect to Petitioner's ability to work in the laboratory. With the support and agreement of Petitioner, Dr. Ann Middaugh, an occupational medicine physician, was retained to evaluate Petitioner's physical and cognitive functional capacity as it related to his ability to perform his job within the laboratory environment. (App. 1358).

Dr. Middaugh made an initial on-site visit to Tastemaker to meet with Human Relations representatives, gather information, and observe Petitioner in the laboratory. In addition to the on-site visit, Dr. Middaugh also obtained a comprehensive medical and occupational history, and conducted physical, neurological and mental status screening examinations. After reviewing the results of these examinations, Dr. Middaugh recommended that Petitioner be examined by Dr. Edwin Barrett, a neuropsychologist. (App. 312). Dr. Barrett, in turn, performed a battery of tests designed to measure Petitioner's intelligence, attention, language, reasoning, memory and personality.

While awaiting Dr. Middaugh's report and opinion, Petitioner validated Tastemaker's fears that his cognitive and physical disabilities posed a safety risk to himself and to others. Although Petitioner had

received clear and repeated admonitions not to personally perform laboratory work, he defied these instructions. On April 29, 1993 Petitioner attempted to perform an experiment involving the use of volatile materials. (App. 313). The chemical involved in the experiment was explosive when mixed with air, and the presence of another agent, water, was essential to its safe use. While attempting to conduct the experiment, Petitioner forgot to turn on the reflux condenser water, which was critical to the safety of everyone in the laboratory. Fortunately, Petitioner's lab assistant discovered and quickly corrected the problem, averting the potential disaster. Clearly, the harm that could have resulted from Petitioner's oversight was substantial.

On May 4, 1993, just a few days after Petitioner's failed experiment, Tastemaker received Dr. Middaugh's written report outlining Petitioner's inability to function in his previous position:

> [T]he results of the March 31, 1993 examination show evidence of global brain damage involving both the right and left hemispheres. There was evidence of significant memory impairment, difficulty in judgment, impaired general thought and organizational processes and impairment in gait and station. The neuropsychologic testing confirms the abnormalities that surfaced on the screening evaluation. [Petitioner] is unable to retain and process new information and has severe memory deficits. . . . ***Overall there is diffuse brain damage which has resulted in serious abnormalities in memory, processing of new information, retention of same, and reasoning and judgment. These impairments are permanent.*** It is unlikely that there will be any significant improvement in the future, particularly given the time elapsed since the injury.

Dr. Middaugh further concluded:

> [T]he job of a bench research chemist involves careful sequencing of chemical reactions in a stepwise, methodical and reproducible manner. ***[Petitioner] is not capable of performing his previous job as a bench chemist in a reliable and safe manner. He would represent a serious safety risk***

> ***to himself, his co-workers and the surrounding environment.*** It is my recommendation that [Petitioner] be permanently restricted from any activities involving bench chemistry.

(App. 314) (emphasis added).

Dr. Barrett's report likewise evidenced a belief that it was unlikely that Petitioner would ever be able to return to his position as a bench chemist. Dr. Barrett confirmed that Petitioner's memory and learning ability had been effected by his head injury:

> [Petitioner] had difficulty benefiting from corrective feedback seemed [sic] to relate to his impaired memory processes. On memory testing, he showed low average recall/recognition of nonverbal materials, whereas he made limited progress when asked to learn and later recall/recognize verbal language materials. He was slow to acquire new information, and once learned, he showed a rapid rate of forgetting with some confabulation.

(App. 554). With respect to Petitioner's ability to return to his former position, Dr. Barrett concluded that "[i]n view of his cognitive deficits, I seriously question [whether] he can function as a bench chemist."

Based on its observation of Petitioner during the 20 months that he tried to resume his former position, the conclusions reached by Drs. Middaugh and Barrett, and Petitioner's flagrant disregard of his medically imposed work restrictions, Tastemaker determined that it was necessary for the safety of all involved to place Petitioner on a short-term disability leave of absence effective May 27, 1993. Throughout the duration of Petitioner's short-term disability leave, Tastemaker responded to his repeated requests to return to work by requiring that he provide a medical opinion that he was able to return to work safely. Petitioner was unable to provide Tastemaker with any such statement or opinion.

On November 23, 1993, Petitioner's short-term disability leave of absence was converted into a long-term disability leave facilitated by Tastemaker's long-term disability insurance carrier, UNUM Life Insurance Company ("UNUM"). In conjunction with the receipt of long-

term disability benefits, Petitioner was re-evaluated by Dr. Tureen in March 1994. Dr. Tureen's conclusion that Petitioner's cognitive abilities were unreliable was particularly instructive because he had examined Petitioner several times following his injury:[4]

> [w]hat emerges then is a certain unreliability of the cognitive system, when [Petitioner] cannot rely on over-learned skills and has to deal with situation which may be continuously changing and thus requiring continual adaptation particularly in novel problem solving situations. . . . ***there would be considerable concern, simply based on this test performance (and based upon past reports of neuropsychological performance) if [Petitioner] were to attempt to function as a bench chemist in potentially hazardous situation***. . . . Based on this particular evaluation, one could not confidently recommend [Petitioner] return to his former position as a bench chemist. It is thought that given the length of time, since the initial injury and the consistency of performance, based upon past reports, as well as the current evaluation, ***that [Petitioner's] deficits are permanent.***

(App. 321) (emphasis added). In 1994 Petitioner also applied for and received social security disability benefits.

At about the same time, UNUM attempted to conduct a job simulation that would be helpful to Petitioner in identifying and accepting his cognitive and physical limitations. UNUM contacted a vocational counselor, Ms. Donna Taylor, to arrange for a job simulation which could be used to assess Petitioner's abilities. Ms. Taylor repeatedly attempted to set up a simulation at the University of Cincinnati, which both UNUM and Ms. Taylor believed was the appropriate location for such a simulation. (App. 823).

Petitioner and his wife repeatedly objected to the idea of a controlled job simulation. As noted by Ms. Taylor, such objections ranged from

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4. Of all the physicians evaluating Petitioner's condition, Dr. Tureen had the best opportunity to observe Petitioner's progress over time. Dr. Tureen first evaluated Petitioner's condition while he was still hospitalized in 1991, and he continued to see him over the next several years.

Petitioner's statement that such an effort would be "ridiculous" as his position was too complicated to be simulated, to a complete refusal to discuss any alternative other than returning Petitioner to his former bench chemistry position.

When Petitioner demanded that he be permitted to conduct an on-site job performance evaluation, Tastemaker responded by stating that ***it would entertain the request so long as Petitioner provided a medical opinion that an on-site evaluation could be conducted safely***. (App. 925). Notes generated by UNUM representative Ms. Wendy Gimbel document her conversation with Ms. Bonar-Stewart of Tastemaker stating that Tastemaker was willing to do an on-site evaluation if Petitioner's doctor would state that he would not present a danger to himself or others. Unbelievably, after criticizing the job simulation proposal and demanding that he be permitted to conduct on-site job testing, Petitioner failed to provide the necessary medical certification that he was able to safely perform laboratory work, and thus his request to conduct such testing could not be acted upon by Tastemaker.

Rather than cooperate with UNUM's professional counselor, or provide medical certification to conduct on-site testing at Tastemaker, Petitioner took matters into his own hands and hired Dr. Hans Zimmer, an *emeritus* organic chemist at the University of Cincinnati, to evaluate his ability to return to his research bench chemist position. Petitioner's attempts to rely on Dr. Zimmer's evaluation as evidence of his ability to perform his job at Tastemaker in a safe manner are without merit. Dr. Zimmer proposed a single organic chemistry problem for Petitioner to solve that Dr. Zimmer deemed worthy of a Ph.D. level organic chemist. Dr. Zimmer did not actively supervise Petitioner's work. In fact, he was out of the country during the majority of the time Petitioner worked in his laboratory. (App. 1695). In addition, Dr. Zimmer admittedly knew nothing about Petitioner's position at Tastemaker, and he made no effort to familiarize himself with Petitioner's job description or projects. (App. 1689) Moreover, Dr. Zimmer advocated Petitioner's use of expired and otherwise unavailable chemicals to complete the experiment, which ultimately caused the experiment to fail. (App. 1687). Despite his lack of familiarity with the essential functions of Petitioner's position and his behavior in the laboratory, Dr. Zimmer authored an opinion that Petitioner was capable of "performing at a Ph.D. level in a lab and in obtaining background literature for high caliber chemical synthesis."

About the same time that Petitioner hired Dr. Zimmer to evaluate his organic chemistry skills, he received notice from UNUM that his long-term disability benefits would terminate effective November 23, 1995. UNUM had conducted a thorough evaluation of Petitioner and concluded that he was unable to resume his former position, but that he did possess transferable skills that would enable him to perform alternative functions in other workplace environments. (App. 329). Tastemaker, in the wake of the overwhelming amount of evidence supporting the conclusion that Petitioner was unable to resume his former position, terminated his employment. Tastemaker based its decision on: (1) its observations of Petitioner during the 20 month period that he returned to work; (2) his inability to comply with work restrictions; (3) numerous medical reports concluding that he suffered from cognitive system unreliability and memory deficits which were permanent; and (4) the determination of the insurance carrier, after conducting a thorough evaluation, that the Petitioner was unable to return to his former position as a research bench chemist. (App. 353).

In 1994, about a year after being placed on long-term disability leave, Petitioner had filed a Complaint in the United States District Court for the Southern District of Ohio alleging that Tastemaker had discriminated against him on the basis of his disability in violation of the ADA and Ohio Revised Code § 4112.02(A). Following extensive discovery, Tastemaker filed a Motion for Summary Judgment, stating that Petitioner had failed to establish a *prima facie* case of disability discrimination largely based upon his failure to present sufficient evidence that he was "otherwise qualified" to perform the essential functions of his research bench chemist position either with or without accommodation. The District Court granted Tastemaker's Summary Judgment Motion, holding that Petitioner failed to establish a *prima facie* disability discrimination case. The United States Court of Appeal for the Sixth Circuit affirmed the District Court's decision on April 3, 1998.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES RAISED BY PETITIONER ARE NOT APPROPRIATE FOR REVIEW BY THIS COURT.

The grant of a petition for a writ of certiorari is not a matter of right, but is a matter of judicial discretion. Sup. Ct. R. 10. Generally, a writ of certiorari will be granted "only for compelling reasons." *Id.* Rarely are petitions for a writ of certiorari deemed compelling when the "asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner asserts that the Sixth Circuit Court Of Appeals erred finding that the ADA did not require an employer to accommodate a "regarded as" employee by providing particularized on-site testing of all essential job functions. Since Petitioner's argument hinges on a misapplication of the well-settled accommodation provisions of the ADA, he has failed to raise the type of compelling issue that might warrant the review of this Court.

A. The Petition for Writ of Certiorari Should Not Be Granted Because Petitioner's Argument Is Based Solely On A Misinterpretation Of The ADA's Accommodation Provisions.

Several of the issues of law and of fact decided by the Sixth Circuit in its judgment entered on April 3, 1998 are undisputed by Petitioner and Tastemaker. For instance, the parties agree that in order to state a *prima facie* case of disability discrimination, Petitioner had to offer proof of the following three elements: (1) he was an individual with a disability within the definition of the ADA; (2) he was "otherwise qualified" to perform the job requirements, with or without reasonable accommodation; and (3) he was discharged solely by reason of his handicap. *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996) *citing Maddox v. Univ. of Tenn.*, 62 F.3d 843, 846 (6th Cir. 1995).

At issue in this case was Petitioner's failure to prove the second element of his disability discrimination claim — that he was otherwise

qualified to perform the essential functions of his former position. The District Court originally held, and the Sixth Circuit affirmed, that Petitioner failed to introduce sufficient evidence that he was otherwise qualified to perform the essential functions of his position as a research bench chemist, and therefore, Tastemaker was entitled to summary judgment on Petitioner's disability discrimination and retaliation claims.

Petitioner does not dispute the accuracy of the statement of the law requiring Petitioner to bear the burden of proving that he was otherwise qualified. To quote the Petitioner:

> The Sixth Circuit also correctly ruled that Petitioner, . . . in order to establish a *prima facie* case of disability discrimination, must satisfy the burden of demonstrating that he is qualified to perform essential elements of his job with or without reasonable accommodation.

(Pet. 10), *citing Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996).

Petitioner does not argue that the Sixth Circuit incorrectly applied the facts in evidence to the properly stated law. In fact, the Petition does not raise any question regarding the weight given to certain pieces of evidence by the Sixth Circuit, nor was there any question regarding the operation of inferences. Instead, recounting what he believes to be error, Petitioner presents a question for review that is anchored in a mischaracterization of the applicable law of accommodation under the ADA.

Petitioner argues that his brain injury did not result in any permanent cognitive or physical disability that would interfere with his ability to perform the essential functions of his job as a research bench chemist. As a result, this case has been characterized by Petitioner as one in which the employer has regarded or perceived an employee as being disabled, even though the employee's abilities to perform the job have not actually been impaired.[5]

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5. Tastemaker does not, at this time, address the propriety of characterizing this case as one involving an individual who is "regarded as" disabled, as opposed to actually disabled, because it is outside the scope of the question presented for review.

Therefore, Petitioner asserts that Tastemaker should have to "accommodate" him by permitting him to conduct particularized on-site testing to prove he can perform the essential functions of his bench chemist position. Although Petitioner was evaluated by numerous neurologists, neuropsychologists, and other medical professionals, he argues that the tests that they performed were not particularized for his former position, and that the "gross screening devices" employed by those evaluators were unreliable indicators of his ability to perform as a bench chemist. In support of this argument, Petitioner selectively includes references to on-site testing found within the reports of several professional evaluators.

Petitioner's argument that an employer has a duty to provide particularized on-site testing for each "regarded as" employee is erroneous and unsupported by case law. The Sixth Circuit so concluded in its Opinion in this matter. Petitioner incorrectly characterizes the question presented for review as one of accommodation, when clearly particularized on-site testing does not fall within the definition of an "accommodation" as that term is defined under the ADA.

1. The Sixth Circuit Correctly Concluded that Particularized On-Site Testing To Determine The Ability Of An Employee To Perform The Essential Functions Of The Job Is Not An Accommodation Under The ADA.

The term "reasonable accommodation," although not explicitly defined in the text of the ADA, is defined in the implementing regulations promulgated by the Equal Opportunity Employment Commission ("EEOC"). These regulations provide, in pertinent part, that a reasonable accommodation is an action that serves to enable an employee with a disability to perform the essential functions of his job:

> (1) The term reasonable accommodation means:
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, ***that enable a*** qualified individual with a disability to perform the ***essential functions of that position***; . . .

29 C.F.R. § 1630.2(o)(1)(ii) (emphasis added). In other words, an accommodation is a means of assisting an otherwise qualified employee in fulfilling the essential functions of his position.

Both the text of the ADA and the implementing regulations provide lists of the types of actions that may be included within the definition of a reasonable accommodation. Although the lists are non-exhaustive, they bolster the conclusion that the purpose of an accommodation is to assist an employee in the performance of his essential job functions. For example, the following examples of reasonable accommodation are outlined in the text of 42 U.S.C. § 12111(9):

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

See also 29 C.F.R. § 1620.2(o)(2). Both the definition and examples of "reasonable accommodations" support the finding that the purpose of the accommodation provisions of the ADA is to require employers to ***assist disabled employees in performing their jobs***.

The Sixth Circuit recognized this distinction and held that Petitioner's characterization of particularized on-site testing as an accommodation was "simply incorrect." Noting that the purpose of the accommodation requirement is to assist disabled employees in performing their jobs, the Sixth Circuit correctly held:

> Providing particularized testing of an employee's qualifications is simply not an accommodation under the ADA, because it does not serve to enable an employee to perform his job — it only helps to determine whether the employee is capable of performing his assigned tasks. Tastemaker was entitled to rely on its own chosen method of coming to the conclusion that [Petitioner] was not qualified; . . .

Since the Sixth Circuit decision was in accordance with the definition of an accommodation as a properly stated rule of law, this case does not present the type of compelling issue that would support the grant of a petition for certiorari.

2. The Cases Cited By Petitioner Do Not Strongly Suggest That Particularized On-Site Testing Would Be A Reasonable Accommodation.

Although recognizing that "no other court has ever squarely addressed or resolved [the] issue" of whether on the job testing is an effective accommodation for a regarded as disabled employee, Petitioner cites several cases that he believes "strongly suggest" that courts would find such an accommodation to be proper. (Pet. 15). These cases, however, are easily distinguished and do not provide any support for Petitioner's accommodation argument.

The first case cited by Petitioner is *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987). Petitioner argues that *Arline* provides support for the conclusion that there is some requirement on the part of employers to conduct an individualized inquiry into the employee's medical condition. This, however, misstates this Court's holding.

Arline involved a schoolteacher who suffered from chronic relapses of tuberculosis. Concerned about the contagious nature of her illness, the school board discharged the schoolteacher following her third relapse. This Court held that recurring contagious diseases could constitute a disability under the ADA. After determining that the schoolteacher was disabled, the Court addressed the issue of whether she was "otherwise qualified" to teach. In describing the inquiry necessary to determine if the schoolteacher was otherwise qualified, the Court explicitly stated that:

> ***[T]he district court will need to conduct an individualized inquiry and make appropriate findings of fact.*** Such an inquiry [by the court] is essential if [the statute] is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, . . .

Id. at 287 (emphasis added).

While Petitioner correctly notes that *Arline* required an individualized inquiry into the facts of the schoolteacher's illness, he fails to recognize that the inquiry was to be conducted by the district court, ***not the employer***. *Arline* stops short of placing an affirmative duty on the employer to determine the extent and risk of contracting a contagious disease.[6]

Petitioner also cites *Cook v. State of Rhode Island Dept. of Mental Health, Retardation & Hosps.*, 10 F.3d 17 (1st Cir. 1993) in support of his contention that an employer has a duty to accommodate a "regarded as" employee by permitting on-site particularized testing. Admitting that *Cook* does not address the issue of accommodation *per se*, Petitioner correctly states the holding of the case. However, Petitioner overlooks the fact that the court limited an employer's duty with respect to determining a "regarded as" employee's qualifications to a duty not to base such decisions on subjective beliefs and stereotypes.

The facts of *Cook* involved a public health entity's failure to rehire a morbidly obese nursing assistant. The employer's decision not to rehire the otherwise qualified woman was based on its perception that she would be ineffective in the position due to her excessive weight. Apparently, the nursing assistant had failed to obtain the requisite medical certification, and therefore the employer refused to re-hire her.

After affirming a jury's determination that the nursing assistant was regarded as disabled, the *Cook* court addressed the employer's duty with respect to determining an applicant's qualifications. The court held that

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6. Petitioner notes that the "otherwise qualified" inquiry in *Arline* involves two stages: (1) a medical inquiry stage; and (2) a reasonable accommodation stage. Interestingly, inconsistent with his other arguments, Petitioner states that particularized on-site testing falls within the medical inquiry stage, and not the accommodation stage:

> Whether [Petitioner] can perform his job turns on a initial medical inquiry of his performance in the laboratory which can only take place with the employer's cooperation. Once this takes place, the second inquiry would be whether the Petitioner needed an accommodation, and if so, what form that accommodation should take.

(Pet. 17).

an employer is not required to be unfailingly correct in its assessment of a person's qualifications for a particular job. However, an employer may not base its refusal to hire merely on an impermissible subjective belief that an individual is unable to perform the essential functions of the job. *Id.* at 26-27. Instead, an employer's belief that an individual is not qualified for a position must simply be based on some type of objective evidence. *See Southeastern Community College v. Davis*, 442 U.S. 397, 405, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979) (holding that mere possession of a handicap is not a sufficient ground for assuming an inability to function within a certain context).

This same principle is echoed in two of the other cases cited by Petitioner in support of his claims. In *EEOC v. The Chrysler Corp.*, 917 F. Supp. 1164 (E.D. Mich. 1996), Chrysler refused to hire an applicant [who was diabetic] to fill a position as an electrician. Chrysler based its decision on three blood sugar tests performed by the company doctor. The court condemned the company's refusal to hire without performing a more thorough assessment of the individual employee's physical condition. *EEOC v. Texas Bus Line*, 923 F. Supp. 965 (S.D. Tex. 1996), reached the same conclusion. In that case, a bus company refused to hire an obese individual on the basis that she failed the company's very cursory medical exam. The court held that the company was required, prior to rejecting the applicant, to obtain some type of objective evidence on which to base its decision that the applicant was not qualified for the position.

Therefore, even if these cases are interpreted in their most favorable light, all that is required of an employer when evaluating the capabilities of a regarded as disabled employee is that it base its decision on his or her abilities on some type of objective evidence. These cases fall far short of requiring particularized on-site testing. Instead, they focus mainly on requiring an employer to objectively determine the medical and physical capabilities of an employee, so as to prevent an employer from basing its employment decision on myths or stereotypes.

In the present case, Tastemaker offered a "mountain" of objective evidence in support of its conclusion that Petitioner was not able to perform the essential functions of his job. Tastemaker "bent over backward in order to ascertain [Petitioner's] functional ability." It is undisputed that Tastemaker permitted Petition to return to work for a

period of 20 months. For portions of this time, Petitioner was permitted to work in the laboratory, at first on his own, and later with a lab assistant hired by Tastemaker.

Following a fall in the laboratory and the imposition of medical restrictions, Petitioner was banned from personally performing laboratory experiments. Due to Petitioner's frustration with these restrictions, Tastemaker developed a five-stage plan to determine Petitioner's ability to return to laboratory work. Although satisfactorily completing the first four stages, Petitioner was unable to demonstrate that he was physically able to return to the lab.

In order to assist in his further recovery, Tastemaker approved and paid for additional physical therapy for Petitioner beyond the limits of his insurance. An occupational medicine physician was hired, with Petitioner's approval, to evaluate his ability to function in a laboratory setting. This physician observed Petitioner in Tastemaker's laboratory, and conducted a thorough on-site evaluation and physical examination.

Petitioner later visited a neuropsychologist, who administered several written tests to gauge Petitioner's functional and cognitive abilities. Both physicians produced reports concluding that Petitioner was very likely unable to ever perform bench chemistry again, and opined that Petitioner's physical and cognitive disabilities were permanent.

While Petitioner was on short and long-term disability leave, he was given the opportunity to undergo a job simulation, which he refused to do. He was also evaluated by his former neurologist, who confirmed that Petitioner would no longer be able to perform bench chemistry, and stated that "there would be considerable concern, . . . if [Petitioner] were to attempt to function as a bench chemist in a potentially hazardous situation." Certainly, this evidence, collected over a period of three years, provided a sufficient objective basis supporting Tastemaker's belief that Petitioner was no longer able to perform the essential functions of his former position as a research bench chemist.

3. The Medical Evaluations That Petitioner Relies Upon, When Reviewed In Full, Support The Conclusion That Petitioner Was Not Otherwise Qualified To Resume His Position As a Research Bench Chemist.

Aside from case law, Petitioner also cites the written reports of several medical evaluators as providing objective support for the necessity of particularized on-site testing. However, when the medical evidence is reviewed in full, and all of the evaluators' opinions are considered, it is clear that each evaluator confirmed that Petitioner had sustained permanent cognitive deficits as a result of his accident, and was unable to perform the essential functions of his former position.

Petitioner references the report of Dr. Michael F. Hartings for the proposition that particularized on-site testing might be worthwhile in evaluating Petitioner's ability to perform bench chemistry. However, when Dr. Hartings prepared this report, he was unaware that such options had already been pursued. In fact, when Dr. Hartings mentioned the possibility of an on-site trial to the Petitioner and his wife, he noted that "[they] seemed to feel that that option has now been exhausted, and they are considering what course to follow from here." (App. 348).

Dr. Hartings also agreed with earlier evaluators that Petitioner was suffering from deficits in his "verbal/linguistic memory, and mild deficiencies in problem-solving and speed and efficiency of thinking." Spontaneous improvements in Petitioner's condition, according to Dr. Hartings, were unlikely to occur. As a result of his evaluation, Dr. Hartings concluded that "[Petitioner] is probably not capable of returning to his job as an active bench chemist . . ." (App. 348).

The evaluation performed by Dr. O'Dell, which Petitioner believes is "particularly authoritative" due to his position as the Director of Brain Injury Rehabilitation at the University of Cincinnati, agrees with the conclusions reached by the other evaluators. (Pet. 6). Dr. O'Dell diagnosed Petitioner as having a "traumatic brain injury manifested primarily by cognitive deficits." Although Dr. O'Dell believed that an on-site evaluation of Petitioner's capabilities was not "unreasonable," he suggested that it be done with a job coach or other qualified person supervising Petitioner's actions. It is unclear whether Dr. O'Dell, at the

time he authored his report, was aware that particularized on-site testing had already been performed. (App. 601).

Petitioner was also contacted by a Licensed Professional Counselor, Ms. Donna Taylor, who was hired by Tastemaker's Disability Insurer to evaluate Petitioner's skills and abilities. Although Petitioner represents that Ms. Taylor stated "that the preferred method of determining whether [Petitioner] had recovered from his brain injury to a point that he could resume his prior bench responsibilities" was a trial work period in respondent's own laboratory, review of Ms. Taylor's correspondence reveals that the on-site testing was simply one method of determining the extent of Petitioner's ability to perform the essential functions of his prior position. (Pet. 7).

In the alternative, Ms. Taylor suggested that a comprehensive head injury evaluation be conducted in which the cognitive demands of his occupation could be simulated. (App. 579). Ms. Taylor continued to pursue the job simulation option, contacting several local organic chemists who were qualified to provide an objective assessment of Petitioner's laboratory capabilities. Petitioner objected to any such job simulations conducted in outside laboratories, stating that such a simulation would be "ridiculous." Rather than participate in any UNUM-sponsored job simulation, Petitioner hired Dr. Hans Zimmer, a University of Cincinnati professor with a PhD in Chemistry, to conduct a private evaluation of his laboratory skills.

Ms. Taylor's correspondence clearly reflects her belief that Petitioner was unable to return to his position as a research bench chemist, which is confirmed by her continued recommendation that Petitioner receive long-term disability benefits. Despite Petitioner's expression of a desire to return to work, Ms. Taylor noted that his ability to perform the essential functions of the position, even with the aid of a laboratory assistant, was "questionable" based on her review of the medical and psychological reports contained in his file.

Therefore, while Petitioner is correct in stating that several medical evaluators suggested that on-site testing might have been helpful in confirming their belief that Petitioner could not return to bench chemistry, each evaluator nevertheless diagnosed Petitioner with significant cognitive

deficits that were unlikely to improve with the passage of time, resulting in his inability to function as a bench chemist.

B. The Petition For A Writ Of Certiorari Should Not Be Granted Because, Even If Particularized On-Site Testing Is Held To Be An Accommodation Under The ADA, Tastemaker Conducted Sufficient On-Site Testing Of Petitioner To Determine He Was Unable to Perform The Essential Functions Of His Job.

As the Sixth Circuit aptly stated, Tastemaker "bent over backward" to ascertain Petitioner's functional ability, and it based its termination of him on detailed information. Unlike the applicants in the "regarded as" disabled cases cited in the Petition, Petitioner enjoyed a period of 20 months during which time he was returned to his former position. He was able to work in the laboratory and use his former office for a significant portion of that time. Petitioner's former colleagues were able to observe his behavior in a work setting after his accident and provide Tastemaker with information about Petitioner's laboratory behavior.

After recognizing that Petitioner was experiencing residual physical and cognitive deficits as a result of his brain injury, Tastemaker tailored his workload to include the assignment of specific self-contained projects, and provided him with direct supervision from several members of the Research and Development team. Petitioner was encouraged to resume his routine of consulting with other chemists regarding their current research projects.

When it became apparent that Petitioner was not performing at his pre-injury level, Tastemaker provided Petitioner with the opportunity to review organic chemistry in a pressure-free environment, in the attempt to encourage Petitioner to recapture the intellectual creativity that had disappeared after his accident. After a four-month period of study, Petitioner requested the opportunity to return to performing laboratory work.

In an effort to assist Petitioner in a safe return to laboratory, Tastemaker designed a five-step program to evaluate his ability to safely perform laboratory work. When Petitioner was unable to complete the five stages satisfactorily, Tastemaker hired an outside occupational

medicine physician, Dr. Middaugh, to evaluate Petitioner's ability to function in his former position.

With Petitioner's consent, Dr. Middaugh visited Tastemaker and observed Petitioner's laboratory work. After conducting an on-site evaluation and a later examination, Dr. Middaugh consulted with Dr. Barrett, who then performed a number of neuropsychological tests on Petitioner. After reviewing all of the test results, Dr. Middaugh concluded that Petitioner was not capable of performing his previous job as a research bench chemist in a reliable and safe manner.

Petitioner was even given the opportunity to continue to work in Tastemaker's laboratory, albeit with a lab assistant. He was permitted to design and supervise laboratory experimentation, and was only restricted from personally performing the experiments himself. Although Tastemaker made every effort to assist Petitioner in his return to the laboratory, Petitioner breached Tastemaker's trust by personally performing laboratory work in flagrant violation of his work restrictions. While in the laboratory, Petitioner forgot to use one of the necessary safety devices, which could have had disastrous results.

Even while Petitioner was on disability leave, his ability to return to the laboratory continued to be evaluated. UNUM, Tastemaker's disability carrier, provided him with the services of a vocational counselor who attempted to set up a job simulation to evaluate Petitioner's laboratory skills. Although this was not particularized on-site testing, Petitioner refused to participate in the simulation, terming it "ridiculous" and demanded that he be permitted to return to Tastemaker.

Although Tastemaker was apprehensive about permitting Petitioner to perform experiments in its laboratory due to his prior failure to use all necessary safety devices, Tastemaker expressed its willingness to permit on-site particularized job testing of Petitioner, so long as he provided Tastemaker with a medical opinion that an on-site evaluation could be performed safely. Petitioner failed to provide any such medical authorization, so due to its concern for the safety of its employees, Tastemaker was unable to permit additional on-site job testing of Petitioner's laboratory skills.

Even if this Court were to decide that Tastemaker did have an obligation to permit particularized on-site testing of Petitioner, Tastemaker easily fulfilled any such requirement. Clearly the 20 month period during which Petitioner returned to work and was provided with a five-step plan to evaluate his ability to return to the laboratory, coupled with his actual return to laboratory work is sufficient particularized on-site testing for Tastemaker to evaluate Petitioner's ability to function within the laboratory environment. The evidence also shows that Tastemaker was willing to contribute to any job simulation efforts, and had even consented to perform additional on-site testing so long as Petitioner was able to provide a medical opinion that his performance of laboratory work would not present a danger to himself or others. Certainly, these actions constitute sufficient particularized on-site testing to satisfy any obligation of the employer to objectively evaluate Petitioner's skills and abilities in the laboratory.

CONCLUSION

The Sixth Circuit Court of Appeals decision affirms the District Court's grant of summary judgment based upon Petitioner's failure to establish that he was "otherwise qualified" to perform organic chemistry research and bench experimentation. The Petitioner does not seek the review of this Court on the basis that he was otherwise qualified, or that the Sixth Circuit erred in stating the applicable law or applying the law to the undisputed facts. Instead, Petitioner's argument rests squarely on a misapplication of the ADA's accommodation provisions. If Petitioner has failed to satisfy his burden with respect to being "otherwise qualified" and he does not contest the Sixth Circuit's decision on that issue, then this Court need not consider the accommodation issue.

With respect to the question presented, Petitioner mischaracterizes particularized on-site testing as an accommodation. Clearly, this characterization is incorrect. The EEOC implementing regulations expressly define an "accommodation" as a modification that "enable[s] a qualified individual with a disability to perform the essential functions of his position." There is nothing about particularized on-site testing that aides Petitioner in performing the essential functions of research bench chemistry. The case law cited by Petitioner is inapposite, and the medical reports, when considered in full, support the conclusion that Petitioner suffered from permanent cognitive impairments. The Sixth Circuit

reviewed these facts and the law in concluding that this was a "qualification" case and not an "accommodation" case. Even if this Court were to find that the Respondents were obligated to conduct particularized on-site testing, Respondent submits that its actions would have satisfied any such requirement.

For all of the reasons set forth above, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

ROBIN E. HARVEY
Counsel of Record
AMY L. GARRARD
BAKER & HOSTETLER LLP
Attorneys for Respondents
312 Walnut Street
Suite 2650
Cincinnati, Ohio 45202-4038
(513) 929-3400